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No. 10-801

Supreme Court, U.S.
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In the
Supreme Court of the United States

JOSE VALLE, INDIVIDUALLY, AND AS REPRESENTATIVE OF THE ESTATE OF OMAR ESPARZA, AND ASUNCION VALLE,
Petitioners,

v.

THE CITY OF HOUSTON, TEXAS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY BRIEF

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REPLY

The City's Opposition does not dispute the circuits' conflicting treatment of both questions presented. The City simply contends that the Fifth Circuit's approach is correct. That suggests that this Court's review is warranted on these recurring issues. Moreover, the City's defense of the Fifth Circuit's approach reveals that circuit to be straying from the proper principles of municipal liability under § 1983. Certiorari should be granted.

I. The City does not dispute that other circuits would not require a showing of a pattern of actual violations to establish deliberate indifference here.

As noted in the petition, other circuits recognize that the fundamental issue in failure-to-train cases is whether the municipality was aware of the likelihood for constitutional violations. Pet. at 9–11. For these circuits, establishing a prior pattern of actual violations is simply one permissible way to show the municipality was aware of that likelihood. *Id.*; *e.g.*, *Young v. City of Providence*, 404 F.3d 4, 28–29 (1st Cir. 2005) ("Although there was no evidence of a prior friendly fire shooting, a jury could find from the testimony of [officials] that the department knew that there was a high risk that absent particularized training on avoiding off-duty misidentifications, and given the department's always armed/always on-duty policy, friendly fire shootings were likely to occur."). Even here the Fifth Circuit concluded that a jury could find that "City officials were aware of the potential for constitutional violations in situations involving mentally ill persons." Pet. App. 19a–20a. The Fifth

Circuit also concluded, however, that a prior pattern must be shown. *Id.* 20a.

The City does not dispute that there are varying approaches of the circuits regarding the deliberate-indifference standard. *See* Note, *Thompson v. Connick: The Fifth Circuit Tiptoes Around the Issue of Qualified Prosecutorial Immunity and Collapses Municipal and Vicarious Liability Under § 1983*, 84 Tul. L. Rev. 1403, 1409 (2010) ("Circuit courts have varied in their application of the Court's deliberate indifference standard and heightened causation requirements articulated in *Monell*, *City of Canton*, and *Bryan County*.").

The City simply contends that the Fifth Circuit's approach—requiring a proven pattern of specific, actual violations even when the municipality is otherwise aware of the problem—flows from this Court's decisions. Opp. at 7. But that illogical approach undercuts this Court's precedent. As noted in the petition, the touchstone for municipal liability is awareness. Pet. at 9. Supervising Officer Mike Webb's explicit warning that untrained officers might "shoot and kill" individuals such as Omar contributed to that awareness. And so did expert testimony documenting at least ten incidents pre-dating Omar's death where Houston officers shot mentally ill people who were unarmed or carrying objects such as screwdrivers or pieces of wood. Pet. App. 20a. Contrast this with *City of Canton v. Harris*, where Justice O'Connor noted that "[t]here is quite simply nothing in this record to indicate that the city of Canton had any reason to suspect that failing to provide this kind of training would lead to injuries of

any kind . . . ." 489 U.S. 378, 399 (1989) (O'Connor, J., concurring in part and dissenting in part).

This Court should grant review to make clear that a showing of a prior pattern of actual violations is but one means to establish a municipality's awareness of the likelihood for constitutional violations.

II. The City does not dispute that other circuits would have concluded that the delegation of authority here made the decisionmaker a policymaker.

The petition explained that other circuits recognize that a municipality cannot insulate itself from § 1983 liability by simply delegating policy decisions to an official with unfettered discretion to make those decisions. Pet. at 15–16. These policy decisions include "choosing a course of action tailored to a particular situation . . . ." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986). The circuits have been guided in part by *City of St. Louis v. Praprotnik*, in which this Court explained that determining whether the decisionmaker is a policymaker can depend on whether the decisionmaker is constrained by other policies and whether the decision is subject to review. 485 U.S. 112, 126 (1988).

The City does not dispute that other circuits take an approach that prevents municipalities from avoiding liability through the simple delegation of authority. The City simply contends that the Fifth Circuit's approach is correct. But the primary basis for seeking this Court's review is the circuits' differing approaches. As one commenter explains, "[d]espite the *Praprotnik* Court's intention to unify the law as to

when government action implicates a municipal policy, the contrasting views expressed by circuit courts about when policymakers have delegated their policymaking authority and whether certain officials are per se policymakers demonstrate that *Praprotnik* has proven to be an unsuccessful guide." Steven Cushman, *Municipal Liability Under § 1983: Toward a New Definition of Municipal Policymaker*, 34 B.C. L. Rev. 693, 694 (1993).

Indeed, this case presents a perfect example of how a circuit can misread this Court's precedent regarding municipal liability. The Chief of Police appointed Captain Williams as the final decisionmaker for difficult-arrest decisions, such as those involving people who have locked themselves in a home. And under the applicable General Order and standard operating procedures, Captain Williams—and nobody else—decided what course of action to take for the particular situation. Pet. at 5. The City's two reasons to say that it is insulated from liability for that decision reveal the infirmities with the Fifth Circuit's approach.

First, the City says it cannot be liable for Captain Williams' discretionary action because he was constrained by the same policy that gave him the discretion to act. Opp. at 9. The City does not explain how this policy constrained his decision. To the contrary, the City admits that Williams "had the authority to use his discretion in how to handle special threats on a day-to-day basis." *Id.* Under the City's view, then, when a municipal policy delegates full authority to a subordinate decisionmaker, the municipality can never be liable because the decisionmaker is automatically "constrained" by that

same policy. This epitomizes the misreading of this Court's precedent. *See* Cushman, *supra*, at 722 ("[T]he restrictive view of delegation of authority [has] allowed municipalities, intentionally or unintentionally, to insulate themselves from § 1983 liability by divorcing final policymaking authority from final authority to act.").

Second, the City says it cannot be liable because Captain Williams' actions were subject to review, as he was disciplined by the Department for his actions. Opp. at 9. But that decision was later overturned for a crucial reason: Captain Williams "acted within the policies and procedures of the police department." Pet. App. 4a. In other words, under City policy, Captain Williams had unfettered discretion—delegated by the Chief of Police—to decide what action the City would take against Omar. So a correct review of his conduct under these circumstances would always conclude that he had acted within City policy. That means there is no meaningful review of Captain Williams' underlying policy decision itself—here, the forced entry and seizure of Omar. *Cf. Myers v. City of Cincinnati*, 14 F.3d 1115, 1118 (6th Cir. 1994) ("A municipality may not escape *Monell* liability . . . by simply delegating decisionmaking authority to a subordinate official and thereafter studiously refusing to review his unconstitutional action on the merits.").

Thus, under the proper analysis, this case replicates *Pembaur*. There, police officers spoke with Dr. Pembaur through the door at his office and insisted that he let them enter to detain people inside. 475 U.S. at 472. When he refused, the officers called for instructions, and the county prosecutor told the officers to go in—the officers then broke down the door

and detained two people. *Id.* When Pembaur's § 1983 suit against the municipality reached this Court, it held that the county prosecutor was acting as the final decisionmaker for the county and that the county could therefore be held liable. *Id.* at 485. Captain Williams had been delegated the same sort of authority when he ordered the untrained officers to break into the Valles' home, where the officers killed Omar.

This Court should grant review to resolve the conflicting views of the circuits regarding the line between policymakers and decisionmakers for purposes of municipal liability.

* * *

A final note is required to correct how the City has described Omar's killing to this Court. The City says that when "the officers entered the home, [Omar] charged at the officers with a hammer." Opp. at 2. Even the Fifth Circuit's opinion reveals that to be misleading. Pet. App. 4a n.1 ("In its summary judgment opinion, the district court improperly resolved the factual dispute about whether [Omar] possessed a hammer in the City's favor. It should have credited Mrs. Valle's testimony that her son did not have a hammer.").

CONCLUSION

The City has not disputed that the circuits approach the questions presented in conflicting ways. The petition should be granted.

Respectfully submitted,

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